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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ANDREW MALDONADO,

Defendant and Appellant.

B216196

(Los Angeles County
Super. Ct. No. GA072412)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Leslie E. Brown, Judge. Affirmed as modified.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie
A. Miyoshi and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and
Respondent.

Anthony Andrew Maldonado appeals from the judgment entered after he was convicted of robbery with a finding he personally used a firearm to commit the offense. He challenges the sufficiency of the evidence to support the robbery conviction and the firearm-use enhancement. We modify the judgment to include 115 additional days of presentence custody credit and, as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Charges

Maldonado was charged by amended information with one count of first degree robbery of Joaquin Martinez Rosas, a taxicab operator (Pen. Code, § 211).¹ The information specially alleged a firearm-use enhancement under section 12022.53, subdivision (b). It also specially alleged Maldonado was subject to sentencing under the “Three Strikes” law for one prior serious or violent felony conviction for burglary (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and under section 667, subdivision (a)(1), and had served one prior prison term for a felony within the meaning of section 667.5, subdivision (b).

2. Summary of the Evidence Presented at Trial

a. Prosecution evidence

In 2008, Robert Contreras was working as a dispatcher for T.U. Independent Taxi Service, where he also worked as a driver. According to Contreras, T.U. Independent Taxi Service was an unofficial taxicab company comprised of individuals, who, as independent contractors, were paid to drive others in their own vehicles. These vehicles did not display a special license plate or numbers indicating they operated as taxicabs. T.U. Independent Taxi Service had no business office, and it paid no licensing fees to the city.

¹ Statutory references are to the Penal Code unless otherwise indicated.

At around 6:00 p.m. on February 16, 2008, Contreras received a telephone call from Adriana Salazar requesting taxicab service. Salazar was a repeat customer; on three prior occasions Contreras had been dispatched to the same address in Glendale to pick up Salazar and her companion, Maldonado. This time, Contreras dispatched Joaquin Martinez Rosas to the Glendale address.

Rosas was a driver and independent contractor for T.U. Independent Taxi Service on February 16, 2008. That night he was driving his Toyota Sienna passenger van. Rosas's three-year-old son and one-year-old daughter were sitting in the last row of seats. When Rosas arrived at the Glendale address, Salazar and Maldonado got into the middle row of seats. Rosas could see both of them clearly. Maldonado was wearing a grey or white hooded sweatshirt. Tattoos were visible on Maldonado's neck and head.

As directed by Salazar, Rosas drove her and Maldonado to Sun Valley before stopping briefly in Pacoima and then returning to the Glendale address. At various times during the 45 minute trip, Rosas watched Maldonado. Maldonado did not speak directly to Rosas, but Rosas listened to him converse with Salazar.

When Rosas drove up to the Glendale address, Salazar told him to wait there to be paid. Maldonado and Salazar both got out of the van, but only Maldonado headed towards the apartments. Salazar stayed outside of the van for awhile, but then climbed back into the middle row of seats.

Ten minutes later, Maldonado ran up and pulled Salazar out of the van. She stood beside the van, and Maldonado opened the front passenger door. Maldonado was now wearing a cap, and his mouth was covered with a bandana, so only his eyes and nose were visible. At one point, the bandana fell from Maldonado's face enabling Rosas to see his moustache. Maldonado held a brown and silver gun near his waist and demanded money from Rosas. Frightened, Rosas opened the fare box, attached to the inside of the van. Maldonado removed the money from the box. While continuing to hold the gun on Rosas, Maldonado patted Rosas's body and searched his pockets. Maldonado then left the van, and Rosas drove away.

Rosas testified he recognized Maldonado as the robber because he was dressed in the same clothing he had worn during the 45 minute van ride earlier that evening. Rosas also identified Maldonado from his voice as well as from his nose and eyes.

Glendale Police Department was contacted and informed of the robbery. Three days later, Rosas identified Maldonado's picture as the robber in a photographic lineup prepared by police. At trial, Rosas identified Maldonado as the robber. Six days after the robbery, police searched Maldonado's residence and recovered a grey hooded sweatshirt. However, officers found neither a bandana nor a gun.

b. Defense evidence

Maldonado did not testify in his defense. Glendale Police Department Officer Alexis Kang testified he responded to the robbery call and spoke to Rosas, who described the robber as wearing a white sweatshirt with a hood over his head and a bandana over his mouth. If Rosas had mentioned seeing the robber's nose and moustache, Officer Kang would have noted it in his report. Rosas did not say anything about a cap. Rosas indicated the robber had a black steel revolver.

The defense also called Dr. Mitchell Eisen an expert on the reliability of eyewitness identification. He testified as to the factors that could affect the accuracy of an identification, including the stress which can lead to difficulty focusing; the presence of a weapon which can dominate a person's attention; the length of time of exposure; the suggestive aspects of a six pack or photographic lineup; and the lack of correlation between a witness's confidence and the accuracy of an identification. Dr. Eisen also testified to the obvious fact it is more difficult to identify someone in disguise, and opined that voice identification is less reliable than face identification.

3. *The Verdict and Sentencing*

The jury found Maldonado guilty of first degree robbery and found true the special firearm allegation. Maldonado waived a jury trial on the special allegations regarding his prior burglary conviction; and the trial court accepted his admission he had previously been convicted of burglary. The court heard and denied Maldonado's motions for new

trial and to dismiss his prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497).

Maldonado was sentenced to an aggregate state prison term of 23 years consisting of the middle term of four years for burglary, doubled to eight years under the “Three Strikes” law, plus 10 years for the firearm-use enhancement and five years for the prior serious felony conviction. The court struck the one-year prior prison term enhancement in furtherance of justice (§ 1385).

CONTENTIONS

Maldonado contends there is insufficient evidence to support the findings he was the robber and personally used a firearm to commit the robbery under section 12022.53, subdivision (b). Maldonado also argues there is insufficient evidence he committed first degree robbery within the meaning of section 212.5.

DISCUSSION

1. Standard of Review

To assess a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no

hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. *Sufficient Evidence Supports Maldonado’s Identity as the Robber*

The evidence, viewed in the light most favorable to the judgment, reasonably supports the jury’s conclusion Maldonado was the robber. Rosas identified Maldonado as the robber to police in a photographic lineup and in court. The in-court eyewitness identification alone is sufficient to sustain Maldonado’s conviction. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; see *People v. Scott* (1978) 21 Cal.3d 284, 296 [“uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable”].)

Maldonado’s arguments to the contrary focus on the unreliability of Rosas’s photographic and voice identifications,² inconsistencies between the description of the robber Rosas gave to police and his trial testimony, and factors which could undermine the accuracy of Rosas’s identification during the robbery (e.g., the robber was disguised and quickly committed the offense; Rosas was frightened and focused on the gun). None of these arguments requires a different result. Indeed, defense counsel made them to the jury during closing argument. The jury was free to weigh the evidence and to reject Maldonado’s attempts to discredit Rosas’s identifications of him as the robber.³ As those identifications were neither physically impossible nor inherently unreliable, we decline Maldonado’s invitation to substitute our evaluation of Rosas’s credibility for that of the fact finder. (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

² Although Maldonado asserts the photographic lineup was “overly suggestive,” he is not claiming his due process rights were violated in that it created a very substantial likelihood of irreparable misidentification. (See *Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247]; *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

³ The jury was instructed properly under CALCRIM No. 315 on how to evaluate the eyewitness testimony presented at trial.

3. *Sufficient Evidence Supports the Firearm-Use Enhancement*

Section 12022.53, subdivision (b), provides, “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) [including robbery] personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. . . .” A “firearm” is defined as “any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.” The firearm need not be operable. (§ 12001, subd. (b); see also CALJIC No. 17.19; CALCRIM No. 3146.)⁴ A BB gun, which expels metal projectiles by pressure from compressed gas, does not fall within this statutory definition (see *In re Jose A.* (1992) 5 Cal.App.4th 697, 701-702), nor, for that matter, does a toy or imitation gun. (See *People v. Jackson* (1979) 92 Cal.App.3d 899, 903, fn. 7.)

In support of his contention there was insufficient evidence he used a firearm as defined, Maldonado relies on the fact Rosas never testified the weapon used was an actual firearm. On direct examination, Rosas merely described the weapon as a gun with a brown handle and silver or grey metal part. Rosas also admitted on cross-examination to not knowing the difference between a revolver and a semiautomatic handgun. Additionally, Maldonado points to the fact that police never found a gun.

The character of a weapon may be shown by circumstantial evidence, including testimonial descriptions of the weapon and its role in the commission of the crime. (See, e.g., *People v. Dominguez* (1995) 38 Cal.App.4th 410, 421 [victim’s testimony he felt a cold steel object pressed against him, coupled with defendant’s threat to kill the victim, constituted substantial evidence weapon used was a firearm]; see also *People v. Green* (1985) 166 Cal.App.3d 514, 517 [substantial evidence supported conclusion firearm used within meaning of § 12022.53, subd. (b), when victim never saw weapon but heard it cocked and bullets were found in defendant’s possession]; *People v. Aranda* (1965) 63

⁴ The jury was instructed properly under CALCRIM No. 3146, which defines firearm in accordance with section 12001, subdivision (b).

Cal.2d 518, 532 [“testimony by witnesses who state that they saw what looked like a gun, even if they cannot identify the type of caliber, will suffice”]); cf. *People v. Rodriguez* (1999) 20 Cal.4th 1, 12-13 [defendant’s statements and behavior while making armed threat against victim may warrant jury’s finding weapon was functional and loaded].)

Most recently, in *People v. Monjaras* (2008) 164 Cal.App.4th 1432 the defendant was convicted of robbery with a firearm-use enhancement after he accosted a woman and demanded she hand over her purse. Pulling up his shirt, the defendant showed the woman the handle of a black pistol in his waistband. At trial, the woman testified she did not know whether the pistol was a toy or real. (*Id.* at pp. 1434-1435.) In rejecting the defendant’s claim of insufficient evidence the appellate court concluded, “[W]hen as here a defendant commits a robbery by displaying an object that looks like a gun, the object’s appearance and the defendant’s conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b). In other words, the victim’s inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm. [Citation.]” (*Monjaras, supra*, at pp. 1437-1438.)

Here, too, there was sufficient evidence from which the jury could find Maldonado used a firearm to commit the robbery under section 12022.53, subdivision (b). Rosas consistently testified Maldonado displayed a gun, demanded the taxicab fare, and then continued to hold the gun while patting down Rosas. Rosas further testified he knew the weapon was a gun, having previously seen pictures of guns. Rosas testified on cross-examination to having told police he thought the gun was a revolver because it was “the little one, [with the barrel] that turns.”⁵ Although Rosas could not identify the gun

⁵ Defense counsel: “You don’t know the difference between a revolver where the barrel goes around and a flat gun, where there’s a clip? [¶] Rosas: “No, I do not.” [¶] “Okay. But you told the officer that night you thought it was a revolver? Do you remember that. [¶] Rosas: “Yes. The little one, that turns.”

conclusively as a real firearm, the weapon looked like a gun, and Maldonado used it to scare Rosas into allowing him to take the taxicab fare. It was reasonable for the jury to infer from Maldonado's conduct that the weapon he was holding was a real, loaded firearm and that he was prepared to shoot Rosas if he resisted. (See *People v. Monjaras*, *supra*, 164 Cal.App.4th at p. 1437.)

4. *Sufficient Evidence Established Rosa Was Performing Duties as a Taxicab Driver Within the Meaning of Section 212.5 at the Time of the Robbery*

Section 212.5, which defines the degrees of robbery, provides that robbery of "any person who is performing his or her duties as an operator of any . . . taxicab . . . or other vehicle . . . and used for the transportation of persons for hire" is robbery of the first degree. (Pen. Code, § 212.5, subd. (a).) Maldonado contends the evidence was insufficient to prove first degree robbery under this definition because there was no evidence Rosas was performing duties as a licensed or regulated taxicab driver at the time of the robbery.⁶

Undisputed evidence proved Rosas was driving his passenger van as a taxicab or a vehicle for transporting persons for hire. Rosas was dispatched by a T.U. Independent Taxi Service dispatcher to pick up and transport Salazar and Maldonado, who were repeat customers, to their requested destination for a fee. Thus, the only reasonable conclusion to be drawn from this evidence is Rosas was a person performing his duties as the operator of a taxicab within the meaning of section 212.5.

⁶ Following the prosecution's presentation of evidence, the defense made a motion for judgment of acquittal (§ 1118.1), arguing there was insufficient evidence that Maldonado committed first degree robbery within the meaning of section 212.5. The court denied the motion.

It is also true the evidence shows Rosas was not a licensed taxicab driver, and the passenger van he was driving at the time of the robbery was not a licensed, regulated and marked taxicab under Vehicle Code section 27908.⁷ However, Maldonado has cited no authority requiring the prosecution to prove these facts as elements of the crime. Nor do we read section 212.5 as excluding persons like Rosas who perform duties as operators of a taxicab, albeit unlicensed and using their personal vehicles. The broad language of the statute declares the robbery of any person operating “any taxicab” to be first degree robbery. Maldonado’s conduct of demanding money from Rosas, who was waiting to be paid for his services, and then stealing the taxicab fare, was sufficient evidence Maldonado robbed Rosas because he was driving a taxicab. Maldonado thus committed a robbery which the Legislature sought to deter with more severe punishment. (See *People v. McDade* (1991) 230 Cal.App.3d 118, 121 [with section 212.5, the Legislature created a statutory scheme increasing sentences for increased victim vulnerability].)

⁷ Vehicle Code section 27908 provides: “(a) In every taxicab operated in this state there will be a sign of heavy material, not smaller than 6 inches by 4 inches, or such other size as the agency regulating the operation of the taxicab provides for other notices or signs required to be in every taxicab, securely attached and clearly displayed in view of the passenger at all times, providing in letters as large as the size of the sign will reasonably allow, all of the following information. ¶ (1) The name, address, and telephone number of the agency regulating the operation of the taxicab. ¶ (2) The name, address, and telephone number of the firm licensed or controlled by the agency regulating the operation of the taxicab. ¶ (b) In the event more than one local regulatory agency has jurisdiction over the operation of the taxicab, the notice required by paragraph (1) of subdivision (a) shall provide the name, address, and telephone number of the agency having jurisdiction in the area where the taxicab operator conducts its greatest volume of business, or, if this cannot readily be ascertained, the agency having jurisdiction in the area where the taxicab operator maintains its offices or primary place of business in such area; or, if neither of the foregoing provisions apply, any agency having jurisdiction of an area where the taxicab operator conducts a substantial volume of business. ¶ (c) As used in this section ‘taxicab’ means as passenger vehicle deemed for carrying not more than eight persons, excluding the driver, and used to carry passengers for hire. “Taxicab” shall not include a charter-party carrier of passengers within the meaning of the Passenger Charter-party Carriers’ Act.” Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code.

5. Maldonado is Entitled to an Additional 115 Days of Presentence Custody Credit.

Maldonado was awarded 381 days of presentence custody credit: 332 actual days and 49 days of conduct credit (15 percent of the actual days served, as limited for violent felonies by Penal Code section 2933.1). Maldonado was arrested on February 22, 2008 and was sentenced on April 28, 2009. -- a span of 432 days when, as required, both the day of arrest and the day of sentencing are included. (See *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Fugate* (1990) 219 Cal.App.3d 1408, 1414.) Maldonado requests, and the People agree, he is therefore entitled to 496 days of presentence custody credit: 432 actual days and 64 days of conduct credit (15 percent of the actual days served).

The record before us is adequate to conclude Maldonado is entitled to an additional 115 days of presentence custody credit. Accordingly, we modify the judgment to reflect a total of 496 days of presentence custody credit. (See *People v. Jones* (2000) 82 Cal.App.4th 485, 493 [although generally under Pen. Code, § 1237.1 a defendant must first present a claim regarding presentence custody credits to the trial court, if there are other issues to be decided on appeal, the appellate court may simply resolve the custody credit issue in the interests of economy]; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427 [“section 1237.1, when properly construed, does not require defense counsel to file motion to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal”].)

DISPOSITION

The judgment is modified to award Maldonado 496 days of presentence custody credit, 432 actual days and 64 days of conduct credit. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.